United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1182

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

JAMES GRIMSLEY,

Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of New York.

BRIEF FOR DEFENDANT-APPELLANT

THOMAS J. O'BRIEN
Attorney for Defendant-Appellant
Two Pennsylvania Plaza
New York, New York 10001
(212) 947-6147

(9661)

LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N.J. (201) 257-6850 | New York, N.Y. (212) 563-2121 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (201) 783-7288

TABLE OF CONTENTS

TABLE OF CASES

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76 - 1192

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

WILLIAM J. JOYCE, et al.,

Defendant-Appellants.

BRIEF FOR APPELLANT
JAMES GRIMSLEY

Preliminary Statement

The Appellant, James Grimsley, was indicted, together with 11 others, under indictment No. 75 CR. 488 and charged with conspiracy to possess goods stolen from interstate commerce. Although indictment 75 CR.488 did not charge Mr. Grimsley with the substantive offense of possession in violation of 18 U.S.C. §659, as it had with each of the other co-defendants, a subsequent indictment, 75 CR. 975, did accuse Mr.

Grimsley of that crime.

The indictments were consolidated for trial and the jury found Mr. Grimsley not guilty of conspiracy under indictment 75 CR. 488 but guilty of possession under indictment 75 CR. 975. On April 23, 1976, the court sentenced the Appellant to imprisonment for three years with a condition that the Appellant be confined in a jail-type institution for a period of two months. The remainder of the sentence was suspended and the Appellant, Grimsley, was placed on probation for three years. It is from that conviction that the Appellant appeals.

STATEMENT OF THE FACTS

On March 17, 1975, 117 cartons of Timex watches were stolen from Kennedy Airport while they were moving as part of a foreign shipment of freight. *(T 859-931) Robert Schoenly, a co-defendant, testified that William J. Joyce told him that he had stolen the merchandise and that he had it in a truck. (T 82). Donald Walsh, a cousin of Mr. Joyce, told Mr. Schoenly that he knew a place where the merchandise could be stored. Mr. Shoenly, pursuant to Mr. Walsh's instructions, rented a truck to move the merchandise. (T 85-93).

---

* T - Transcript of the Trial.

Peter Areiter, another co-defendant, testified that on the evening of March 17, 1975 he, Mr. Burns, Mr. Walsh and Mr. Bovell transferred cartons from one truck into another and then transported those cartons to Janet Terri's house. He testified that the cartons had wrapping around them when they delivered them to Miss Terri's house. Mr. Areiter stated that he was to receive $3,000 for moving the boxes and that Mr. Burns' wedding was to be paid for. (T 293-298). That testimony was corroborated by Mr. Burns. (T 420-433).

On March 21, 1975, the cartons were moved from Janet Terri's house to Island Park by Messrs. Walsh, Bovell, Freudigger and Areiter. The wrapping had been removed from the boxes at that time. Plastic bags with wrapping in them were also taken from Janet Terri's house (T 95-106). The cartons were then transported from Island Park to Leonard Nitti's garage. (T 436-440).

Mr. Boyle testified that on March 24, 1975 Mr. Joyce asked him if he knew anyone who would be willing to buy the watches which were stolen from Kennedy Airport. Mr. Boyle mentioned to a few people that the watches were available and waited for a response. On March 27, 1975 he received a telephone call from a person named Joe who said that he wanted to buy the watches. (Joe turned out to be Detective Giordano who was acting in an undercover capacity).

After an agreement was reached with Joe to purchase the watches, Mr. Boyle called William Joyce to arrange for delivery of the watches. Mr. Joyce told Mr. Boyle that he was having a problem getting a truck for delivery. Mr. Boyle told Mr. Joyce that he would make arrangements to get a truck. Mr. Boyle stated that he telephoned Mr. Grimsley, the Appellant herein, and asked if he was interested in moving stolen watches from Valley Stream to Brooklyn for $250.00. Mr. Grimsley accepted the offer and he and Mr. Burns transported the boxes to a garage in Brooklyn where he was arrested while unloading the boxes from his truck. (T 590-605).

F.B.I. Agent Van Nostrand testified that after his arrest, Mr. Grimsley gave a statement regarding his involvement. After taking his statement, Agent Van Nostrand testified that he asked Mr. Grimsley whether he knew the goods were stolen and Mr. Grimsley answered yes. "I think he said in response to one of my questions, he said that the way this was handled it couldn't be anything else but stolen." (T 722-725).

Mr. Grimsley testified that when Mr. Boyle telephoned him he asked whether he would be interested in moving some boxes for him for a "few bucks". He denied that Mr. Boyle ever said that the boxes contained stolen property. He testified that the boxes were not in wrappings when he moved

them and that he did not see any marking on the boxes. He testified that the first time he knew that the boxes contained watches or suspected that anything was wrong was seconds before his arrest when he saw a box opened and a large amount of money being paid Mr. Boyle. (T 997-1007).

Mr. Grimsley testified that at the end of the interview Agent Van Nostrand asked him "Do you know these watches are stolen?" and he replied "I said - so I said - back to him, well it's rather obvious. I wouldn't be down here under arrest". He denied that he ever told the F.B.I. that he knew the watches were stolen at a time when he was moving the boxes (T 1009).

He further testified that he never met Mr. Joyce or Mr. Burns prior to March 27, 1975 and that he never saw Miss Terri or Messrs. Walsh, Bovell, Freudiger, Hanan, Nitti, Schoenly or Areiter prior to coming to court (T 1011-1013).

QUESTION PRESENTED

Whether the court's charge on the issue of knowledge was error.

ARGUMENT

POINT I

THE COURT'S CHARGE
ON THE ELEMENT OF
KNOWLEDGE WAS ERROR

The sole issue for the jury to determine in considering Mr. Grimsley's case was whether or not he knew the goods, which he had in his possession, were stolen.

The defendant Grimsley requested the court to charge that:

> "In order to convict the defendants of possessing stolen property the government must prove beyond a reasonable doubt that the defendant 'actually knew' that the watches were stolen. Mere suspicion is not enough."

In considering that request the court stated:

> "I am not going to give one of those words, but I will give it in terms of actual knowledge. Mere suspecion, of course, I will charge that in essence." (T 1446)

The court's instructions to the jury on the issue of knowledge follows:

> "[O]ne of the critical questions is whether the defendants knew they had possession of stolen watches. Actual knowledge that a defendant received and then possessed stolen watches is one of the essential elements of the offense charged.
>
> You may not find a defendant guilty unless you find beyond a reasonable doubt that he or she knew that he or she received and was then in possession of stolen merchandise. The fact

of knowledge may be established by direct or circumstancial evidence just as any other fact in the case. Knowledge may be proven by a defendant's conduct since we have no way of looking into a person's mind directly.

Two of the defendants have flatly testified that they had no such knowledge. Now, in this connection bear in mind that one may not willfully and intentionally remain ignorant of a fact, important and material to his conduct, in order to escape the consequences of the criminal law.

If you find from all the evidence beyond a reasonable doubt that any defendant believed he or she received and was then in possession of stolen watches and deliberately and consciously tried to avoid learning that the watches in question were stolen in order to be able to say, should he or she be apprehended, that he or she did not know, you may treat this deliberate avoidance of positive knowledge as the equivalent of knowledge.

In other words, you may find that any defendant acted knowingly if you find that either he or she actually knew that he or she had received stolen watches or that he or she deliberately closed his or her eyes to what he or she had every reason to believe was the fact.

I should like to emphasize, ladies and gentlemen, that the requisite knowledge cannot be established by demonstrating merely negligence or even foolishness on the part of a defendant.

One of the elements of the crime charged is that the accused knew that the Timex watches he, she or they possessed were stolen. As I have already instructed you, that must be proven beyond a reasonable doubt.

Knowledge is something that you cannot see with the eye or touch with the finger. It is seldom possible to prove it by direct evidence. The government relies largely on circumstantial evidence in this case to establish knowledge.

> In deciding whether a defendant knew the Timex watches were stolen, you should consider all the circumstances, such as how a defendant handled the transaction, how he, she or they conducted himself, herself or themselves. Do his, her or their actions betray guilty knowledge that he, she or they were dealing with stolen watches or are the actions those of a duped, innocent man or woman or one who is just acting negligently or carelessly.
>
> Guilty knowledge cannot be extablished by demonstrating merely negligence or even foolishness on the part of a defendant.
>
> Knowledge that the goods have been stolen may be inferred from circumstances that would convince a man of ordinary intelligence that this is a fact. The element of knowledge may be satisfied by proof that a defendant deliberately closed his or her eyes to what otherwise would have been obvious to him or her.
>
> In this connection you should scrutinize the entire conduct of a defendant at or near the time the offenses are alleged to have been committed." (T 1475-1478).

The defendant Grimsley took exception to the underlined portion of the court's charge but no additional or corrective instructions were given on that issue. (T 1512, 1513).

In order to convict a defendant of the crime of possessing stolen property the government is required to prove that the defendant "actually knew" that the property was stolen. United States v. Fields, 466 F.2d 119 (2 Cir. 1972).

In Fields, the court charged that:

"In addition, the government need not prove that the defendant actually knew it was stolen property. If the evidence, circumstantial or otherwise, tends to prove knowledge of the contents and also of the trailer itself being stolen, that would be sufficient."

There the court reversed the conviction holding that the above quoted charge was plain error in that it was contrary to the law, since the government must prove actual knowlege that the goods were stolen.

We submit that the charge given herein was also error in that it was misleading and relieved the jury of the duty of affirmatively finding that the defendant had "actual knowledge". While we recognize that the underlined portion of the charge objected to herein has been referred to and approved by this court in, United States v. Joly, 493 F.2d 672 (2 Cir., 1974); United States v. Olivares-Vega, 495 F. 2d 827 (2 Cir., 1974) and United States v. Jacobs, 475 F.2d 270 (2 Cir., 1973), we contend that inclusion of the so called "studied ignorance" charge was not warranted under the facts herein.

In United States v. Joly, supra, there was no direct evidence that Joly knew that he was carrying cocaine under his belt and he insisted that he did not know what was inside the package which a man gave him to carry through customs for $100.00. Under those facts this court approved the charge

that

> "one may not willfully and intentionally remain ignorant of a fact, important and material to his conduct, in order to escape the consequences of the criminal law"..."In other words, you may find the defendant acted knowingly if you find that either he actually knew he had cocaine or that he deliberately closed his eyes to what he had every reason to believe was the fact."

In United States v. Olivares-Vega, supra, the appellant was a long standing airline employee; who admitted that a suitcase in which cocaine was found seemed unusually heavy and that he had been asked by a fellow worker to take the suitcase to a hotel to deliver it to an unknown party for $300.00, justified the courts charge that, if they found that the defendant did not learn what the suitcase contained only because he deliberately chose not to learn in order to be able to assert his ignorance, the jury could find that he had the legal equivalent of knowledge.

In United States v. Jacobs, supra, there was again no direct evidence of knowledge but the circumstances shrieked of guilty knowledge. There an attorney offered to sell treasury bills, matured or about to mature, at a 65 percent discount. The evidence also showed that a certificate to be presented to the Treasury showed a discount of only 10 percent rather than the actual 65 percent. Doubts were expressed by another lawyer

and an accountant as to whether the sale was legitimate and yet the defendant made no effort to determine whether the bills were stolen. Under those facts the court approved the "conscious avoidance" charge noting that it is proper where the evidence establishes that the actor consciously shuts his eyes to avoid knowing whether or not he is committing unlawful acts.

The facts in the case at bar are distinguishable in that none of the suspecious circumstances, such as in the cases cited above, existed.

Mr. Grimsley received a telephone call from Mr. Boyle, a man he had known for a number of years who asked whether he could use his truck to move some boxes. Depending on whose version the jury believed, Mr. Grimsley was to receive either $200.00 or a few bucks. Mr. Grimsley moved the boxes from a garage in Queens to a garage in Brooklyn where he was arrested two hours later. We submit that those circumstances did not justify a conscious avoidance charge since the evidence did not establish that Mr. Grimsley consciously shut his eyes to avoid knowing whether or not he was committing an unlawful act.

Moreover, a factor which clearly distinguishes this case from the other cases cited is that in our case, there was direct evidence of knowledge. Mr. Boyle testified that

he told Mr. Grimsley that the goods were stolen and Agent Van Nostrand testified that Mr. Grimsley admitted he knew the goods were stolen. Mr. Grimsley denied that Mr. Boyle told him that the goods were stolen and he testified that Agent Van Nostrand misunderstood him. Under these facts the jury should merely have been instructed that the government must prove that the defendant had actual knowledge. The "conscious avoidance" charge was unwarranted, misleading and relieved the jury of the obligation of affirmatively finding knowledge.

POINT II

THE APPELLANT ADOPTS ALL RELEVANT ARGUMENTS MADE IN CO-APPELLANTS' BRIEFS

Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, the appellant Grimsley adopts all relevant arguments made in any co-appellant's brief.

CONCLUSION

The defedant Grimsley's conviction should be reversed.

Respectfully submitted,

THOMAS J. O'BRIEN
Attorney for Defendant-Appellant
Grimsley
Two Pennsylvania Plaza
New York, New York 10001
(212) 947-6147

A 201 Affidavit of Service by Mail

LUTZ APPELLATE PRINTERS, INC.

COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff- Appellee,

- against -

JAMES GRIMSLEY,
Defendant- Appellant,

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Velma N. Howe *being duly sworn,*
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
298 Macon Street, Brooklyn, New York 11216
That on the 28th *day of* June 1976 *, deponent served the annexed*

BRIEF *upon* David Trager *attorney(s) for*

Plaintiff- Appellee *in this action, at* 225 Cadman Plaza, Brooklyn, New York

the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 28th
day of June 19 76

Velma N. Howe

VELMA N. HOWE

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

76-1182

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

----------X

UNITED STATES OF AMERICA

Appellee

-against-

WILLIAM J. JOYCE, DONALD WALSH, EDWARD J. BOYLE, THOMAS M. BURNS, JAMES GRIMSLEY, LEONARD NITTI, JANET TERRI, also known as JANET FERRY, ROBERT SCHOENLY, PETER AREITER, LOUIS BOVELL, JOHN FREUDIGER, and MORTON HANAN

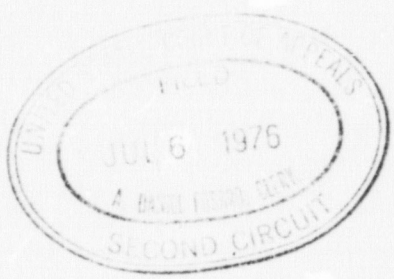
Appellants

----------X

B P/S

76 - 1182

BRIEF ON BEHALF OF APPELLANT DONALD WALSH PURSUANT TO ANDERS v. CALIFORNA



JOHN C. CORBETT
Attorney for appellant WALSH
Office & P.O. Address
66 Court Street
Brooklyn, New York 11201

INDEX

TABLE OF CASES

PRELIMINARY STATEMENT UNDER SECOND CIRCUIT RULE 28

The judgment herein was rendered after a jury trial before United States District Judge THOMAS C. PLATT, in the United States District Court for the Eastern District of New York, which found the appellant DONAL WALSH guilty of both counts of the indictment and judgment of conviction was entered on April 9, 1976.

STATEMENT OF THE ISSUE

The sole issue in this case is whether there are any non-frivolous issues as to DONALD WALSH on appeal.

STATEMENT OF THE CASE

The appellant DONALDWALSH was indicted, with others on a two count indictment, the first count charging the defendants with conspiracy to have in their possession Timex watches stolen from interstate commerce, in violation of Title 18 United States Code Section 659 and Section 2. The second count charged the unlawful possession of the said watches on March 17, 1975, knowing the same to have been stolen from interstate commerce in violation of Title 18, United States Code, Section 659 and Section 2.

Trial commenced on January 19, 1976. The first witness who testified against WALSH was ROBERT SCHOENLY, a co-defendant. He testified that he was acting as bartender at the TIC TOC LOUNGE in Lynbrook, New York, on March 17th, 1975. He testified that co-defendant WILLIAM J. JOYCE came into the bar and told him that he had taken the watches and had the packages in a truck. (Tr. 82). DONALD WALSH entered later with JANET TERRI and was informed of JOYCE'S theft by SCHOENLY, who knew WALSH was a cousin of JOYCE. WALSH said he knew of a place where the watches could be stored, and SCHOENLY, purusant to WALSH'S instruc-

tions, rented a truck from Hub Truck Rental Company to move the watches. (Tr. 85-93).

PETER AREITER, another co-defendant, then testified that on the evening of March 17, 1975, WALSH, together with AREITER, LOUIS BOVELL, and THOMAS M. BURNS, transferred the cartons of watches from the truck in which they were taken from the airport to the rented truck, and from that truck to JANET TERRI'S house. The cartons were wrapped when delivered to TERRI'S house and AREITER was to receive $3,000.00 for his services while BURNS' wedding was to be paid for. (Tr. 293-288). BURNS corroborated this testimony. (Tr. 420-433).

Then on March 21, 1975, the watches were taken from TERRI'S house by WALSH, BOVELL, JOHN FREUDIGER, and AREITER. They were brought by these individuals to a garage in Island Park operated by LEONARD NITTI. (Tr. 436-440). When they were moved at this time the wrappings had been removed from the cartons and the wrappings were in plastic bags. (Tr. 95-106).

EDWARD J. BOYLE, the operator of another bar, testified that he was approached by JOYCE to look for a customer to buy the watches stolen from Kennedy Airport. BOYLE made inquiries and then received a call from a Detective GIORDANO of the Port Authority Police who was acting undercover. BOYLE, JOYCE and WALSH, met the undercover detective passing as "JOE" at a bar and JOYCE gave him a sample. WALSH did not take part in the transaction. As a result, "JOE" agreed to buy the watches and BOYLE then called JAMES GRIMSLEY, a co-defendant, to arrange for delivery. The watches were delivered to Brooklyn and arrests followed, WALSH being arrested later. (Tr 590-605).

WALSH did not take the stand. He was convicted on both counts and received a sentence of 4 years on Count 1, plus a fine of $5,000.00, and 5 years on

Count 2, plus an additional fine of $5,000.00, both sentences of imprisonment to run concurrently, with a total fine of $10,000.00.

POSSIBLE ISSUES ON APPEAL

The only possible issue on appeal is whether there was sufficient evidence to prove guilty knowledge on the part of WALSH in dealing with the watches.

The rule of law, early established by the Supreme Court of the United States, and a principle often applied in the 2nd Circuit was set forth in WILSON v. UNITED STATES, 162 U.S. 613, 619, 16 S. Ct. 895, 898, 40 L. Ed. 1090 (1896):

> Possession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only prima facie evidence of guilt, may be of controlling weight unless explained by circumstances or accounted for in some way consistent with innocence.

Here the testimony of SCHOENLY, in his conversation with WALSH on March 17, 1975, which was uncontroverted, shows that WALSH was informed that JOYCE had stolen watches from the airport. That he had the watches in his possession later on the same day is likewise uncontroverted, and the testimony of PETER AREITER and THOMAS M. BURNS established the fact that WALSH had custody and control of the watches when they were moved to TERRI's house to the NITTI garage. The evidence showed clearly that the concealing of the watches by WALSH was done with guilty knowledge. UNITED STATES v. BRAWER 482 Fed 2d 117 (2nd Circ. 1973).

The evidence of WALSH'S guilty knowledge met the strict standards of UNITED STATES v. TAYLOR 464 F2d 240 (2d Cir. 1972), and the jury was justified in returning a conviction on Count 2.

As to the existence of the conspiracy, the testimony of SCHOENLY shows that after JOYCE had stolen the watches and removed them from the airport, WALSH then became active in the concealing of the stolen property and a conspiracy

was then formed. On the same date the watches were stolen, March 17, 1975, the evidence shows that WALSH arranged for the rental of a truck from Hub Truck Rental Company. He then directed the unloading of the watches from the truck where they were then situated and moved them to TERRI'S house. On March 21, 1975, the evidence has WALSH again arranging for the removal of the watches from TERRI'S house to NITTI'S garage.

There is no question that insofar as WALSH was concerned the jury was justified in finding the existence of a conspiracy between WALSH, JOYCE, and the helpers who moved the watches. All of the testimony establishing these facts was not controverted by WALSH, and was sufficient to establish the existence of the conspiracy. The fact that WALSH did not participate in the later sale of the watches to the undercover detective is of no importance in assessing WALSH'S membership in the conspiracy.

It is not essential that each conspirator participate in all the activities. It is sufficient if the conspiracy is established and that WALSH knowingly contributed his efforts in furtherance of it. UNITED STATES v. BENTVENA 319 Fed 2d 916 (2nd Cir. 1962).

There are no other questions of law which can be raised on appeal by WALSH. The issues were questions of fact which were resolved against the appellant by the jury.

There are no non-frivolous issues on which WALSH may appeal.

CONCLUSION

For the above stated reasons, there are no non-frivolous issues which can be raised on appeal. Accordingly it is respectfully requested that JOHN C. CORBETT be relieved as counsel on this appeal.

Respectfully submitted,

JOHN C. CORBETT
Attorney for Appellant DONALD WALSH

76-1182

76-1192

B

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

LOUIS BOVELL,

Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of New York.

BRIEF FOR DEFENDANT-APPELLANT

WILLIAM SPERLING
Attorney for Defendant-Appellant
125-10 Queens Boulevard
Kew Gardens, New York 11415
(212) 263-7687

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CASES

OTHER AUTHORITIES

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76 - 1192

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

WILLIAM J. JOYCE, et al.,

Defendant-Appellants.

BRIEF FOR APPELLANT
LOUIS BOVELL

Preliminary Statement

The defendant was indicted under two counts for the crimes of conspiracy to possess goods stolen from interstate commerce and unlawful possession of such goods in violation of 18 U.S.C. §§ 371, 659 and 2.

The defendant was found guilty of both counts after trial. On April 9, 1976, the defendant was sentenced to three years on each count, to be confined for a period of six months on each. The defendant appeals from the aforesaid judgment.

STATEMENT OF FACTS

This case arises from the theft on March 17, 1975 from Kennedy Airport of 117 cartons of Timex watches which were moving in interestate commerce. The defendant Schoenly testified that the defendant Joyce informed him that Joyce "had made a hit at the airport." (T 82). The defendant Areiter testified that on March 17, 1975, he was requested by the defendant Joyce to help move "cartons". (T 275). Areiter and the defendant Bovell proceeded to a garage where the cartons were transferred from one truck to another (T 293). The cartons were then driven to Lynbrook (T 295) and placed in the house of the defendant Terri (T 296). On March 21, the defendant Schoenly testified, he was requested by the defendant Walsh to assist in the movement of the stolen shipment (T 88) and rented a truck to effect the transfer (T 90-92). The defendant Bovell, at the request of the defendant Walsh

accompanied Schoenly and helped in the move. (T 98)). Schoenly testified that he had no conversation with the defendant Bovell with respect to the goods transferred (T 234).

The defendant Bovell testified that he had been a truck driver and mover for 18 years. (T 1085). He was requested by Walsh, a friend of several years standing to help in a "small move" for which he would be paid (T 1086). The defendant Bovell moved the stolen goods from a garage to the house of the defendant Terri (T 1088-1089) and subsequently helped in removing the goods from the aforesaid house (T 1092).

The defendant Bovell and his co-defendants testified that he was never informed that the goods in question were stolen. (T 1097). Bovell denied guilty knowledge to the FBI (T 1095). He testified that he was a professional trucker and mover who assisted Walsh as a favor. He testified that he had previously assisted Walsh in a move of household goods. (T 1097). Bovell, an 18 year veteran of the moving business, testified that he had often worked a 14 hour day, had no interest in the nature of the goods he moved and had no reason to examine the packages transferred (T 1089).

The Court deemed itself bothered by the nature of the case against Bovell. It stated that it was entirely possible that the defendant's counsel could lend a hand to "earn an extra buck over the weekend and unload cartons and not know anything about it." (T 957). Nevertheless, the Court submitted the case to the jury and instructed it that it could find tnat the defendant Bovell knew of the theft if "a man of ordinary intelligence" should have known. (T 1478).

QUESTIONS PRESENTED

1.) Where the court charged the jury that it could find that the defendant had actual knowledge of the stolen nature of the goods possessed by him if a man of ordinary intelligence should have had such knowledge, did such charge constitute error in the light of the facts of this case?

2.) Where the evidence against the defendant was circumstantial, he offered a reasonable explanation of his possession, the Court noted the flimsy nature of the prosecution's case against him and a co-defendant was acquitted of one charge on stronger evidence, was the guilt of the defendant proven beyond a reasonable doubt?

POINT I

THE CHARGE OF THE COURT BELOW WAS ERRONEOUS AND PREJUDICIAL WITH RESPECT TO THE QUESTION OF KNOWLEDGE.

Guilty knowledge is a necessary element of the crime of receiving stolen goods and must be proven beyond a reasonable doubt. This Circuit has made clear that the test to be applied is a subjective one, i.e., the government must prove that the defendant, himself, "actually knew" that the property of which he had custody was stolen.* In determining knowledge, the jury may consider circumstantial evidence and where, as here, there is no direct evidence of knowledge, it may be inferred from various facts and circumstances, particularly those surrounding the receipt of the goods. Each juror makes his own assessment of the circumstantial evidence adduced and unquestionably adds to the calculus his own judgment as to whether or not under the circumstances demonstrated by the evidence to have existed, he would have known or suspected that the goods in question were stolen.

---

* United States v. Fields, 406 F. 2d 119 (2d Cir. 1972)

If a juror believes t' . he would have known, he is well on his way to concluding that the defendant "knew". Thus, although this court has spoken in terms of a defendant's actual knowledge, the state of that knowledge is of necessity gauged to a large extent by the personal judgment of each juror as to how he would have reacted under the same circumstances.

It is, therefore, clear that although a totally subjective test is mandated by judicial language, the enunciated standard is diluted by the influence exerted in the evaluation process by each juror's personal and peculiar temperament, intelligence and experience. In this case, the trial court further diluted the standard by instructing the jury that "[k]nowledge that the goods have been stolen may be inferred from circumstances that would convince a man of ordinary intelligence that this is a fact." (T 14781 emphasis added)*. Thus, the charge given by the court to the jury focused the attention of its members on the knowledge of some hypothetical "ordinary" man, rather than that of the defendant himself, whose intelligence was not a matter of inquiry.

---

* The letter T denotes transcript.

The "intelligent man" test and its various counterparts, the "reasonable man" and the "prudent man", have been rejected by this and other circuits. In United States v. Werner,* Judge Learned Hand stated that decisions which predicate knowledge of a particular defendant what "a reasonable man in the receiver's position would have supposed" are "wrong" and that "the better law is otherwise." ** Obviously, a law which measures a defendant's knowledge by the "intelligent man" standard invites a conviction for stupidity rather than guilt. *** As one writer has aptly stated:

> Knowledge and wisdom, far from being one,
> Haft ofttimes no connection.****

Further, in determining that a man of ordinary intelligence should have been convinced that the goods in question were stolen, a juror is somewhat analogous to football's famous quarterback who knows on Monday the plays that should have been called the Saturday before. It is far easier, indeed,

---

* 160 F. 2d 438 (2d Cir. 1947)

** Citing, Peterson v. United States, 9 Cir., 213 F. 920, 922; Kasle v. United States, 6 Cir., 233 F. 878, 888; Pounds v. United States, 7 Cir., 265 F. 242, 245; Stemple v. United States, 4 Cir., 287 F. 132.

*** See, Kasle v. United States, supra.

**** William Cowper, The Task VI

to say after a theft has been certified, that a person should have known of it than it is to reach that same conclusion when the theft has not yet been uncovered. That hindsight is better than foresight is an adage based upon experience and the wisdom which arises after the event has been observed by many writers from Homer on.

In the instant case, the court's instruction that circumstances which should have convinced a man of ordinary intelligencethat the goods in question were stolen should have convinced the defendant herein was particularly damaging since the defendant Bovell was, by virtue of his prior experience, in some respects unique. The prosecutor laid great stress upon the defendant Bovell's lack of curiosity as to the contents of the packages he handled and the fact that although he observed certain labels or markings thereon, he failed to read them. The prosecutor commented upon Mr. Bovell's lack of interest in the contents of the boxes, stating, "I suggest it's just not believable." (T. 1338). However, the testimony of the defendant Bovell revealed that he was a trucker who loaded and unloaded, as well as drove, and had been employed as such for eighteen years. (T. 1085).